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PETITION NOT PRINTED

IN THE

# Supreme Court of the United States

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## No. 186 Misc.

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ALBERT J. PALARDY,

*Petitioner,*

*v.*

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION.

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION.

### HISTORY OF THE CASE.

We cannot accept the Petitioner's summary statement of the matter involved as a fair recital of the facts of the case. At the risk of being overly-long, we set them out at some length because we believe that a complete understanding of them is essential.

The Steamship "Niantic Victory" was owned by the United States acting through the Administrator, War Shipping Administration.[1] Respondent, American-Hawaiian Steamship Company, acted as the so-called "General Agent" for the vessel pursuant to the conventional contract

[1] On the date in question the functions of War Shipping Administration had not yet been transferred back to the Maritime Commission. That did not take place until September 1, 1946, pursuant to § 202 of the Act of July 8, 1946, c. 543, Title II, 60 Stat. 501.

known as War Shipping Form GAA 4-4-42, 7 Fed. Reg. 7561, 46 Code of Fed. Reg., 1943 Cum. Supp. 11427, See 306.44.

The vessel was tied to a Pier at Philadelphia. Loading of cargo aboard the vessel was being done by Luckenbach Steamship Company (R. 11-12a, 15a, 44a), and the Petitioner was employed by that firm (R. 68a). Petitioner was a carpenter but his work was in connection with stevedoring operations. In spite of the fact that the Petitioner's Statement of the Case (Brief, p. 3) would indicate that Luckenbach did the stevedoring pursuant to a contract with American-Hawaiian, that is not the fact. The Record does not show who contracted with Luckenbach for the stevedoring work. The fact is that Luckenbach was working under a contract with the United States but that does not appear in this Record. Under that contract American-Hawaiian "arranged for" Luckenbach to do the work at a particular pier at a particular time, but that is all. We do not ask that the Court consider our statement as to who the parties to the contract were as a fact in the case. We merely refer to it because Petitioner has given an erroneous impression on the point and we would not have this Court assume something in deciding the case which was not in accordance with the true facts. Insofar as the Record in this case is concerned, there is no evidence showing who contracted with Luckenbach to perform the stevedoring.

When Luckenbach employees came on board, the vessel's hatches were all covered (R. 43-44a). This was true of both the top and the intermediate hatch openings under the deck (R. 44a). The vessel was of the so-called "Victory" type built by the Government during the War. Under the main deck is an enclosed space for cargo known as the shelter deck. Under that is a space known as the " 'tween deck" or "between deck" which is under the shelter deck but above the lower or main cargo hold. There are thus three openings or hatches one above the other,

so that when all three of these hatches are open, cargo can be loaded through them into the lower hold.

Luckenbach employees removed the covers and supporting beams from all of these hatches, main deck, shelter deck and 'tween deck (R. 44a). Luckenbach men loaded cargo into the lower hold and Petitioner assisted by constructing braces or "shores" to hold it in place during the voyage. Both the Stevedores and Petitioner were working in natural light while loading was going on (R. 46a, 98a). When the actual loading in the lower hold was completed Petitioner was still busy shoring the cargo there, but his fellow employees, the stevedores, put the beams and hatch covers in place at the 'tween deck level and thus cut off all natural light (R. 99-100a). It was then necessary, if Petitioner was to continue working there, to supply him with artificial light. His foreman went to one of the gear lockers in the masthouse on the main deck of the vessel where he knew the ship lights were stored and took out a light known as a cargo cluster light (R. 46a). Luckenbach employees plugged in the light at the masthouse on deck near the after end of the hold (R. 57a).

As the loading progressed from the lower hold to the 'tween deck to the shelter deck, the stevedores in each case followed the same practice. They put back the hatch covers at each level and thus made it impossible for natural light to enter (R. 45-46a). However, they apparently did not put them all back. One hatch board was left off at the 'tween deck level and one was either left off or taken off by Petitioner or one of his fellow-employees at the shelter deck level (R. 45a, 61a). It was through this opening that Petitioner fell and was injured (R. 40-41a). As his own foreman said, the opening was created by Petitioner's fellow employees either by failing to put one board back or by removing one after it had been replaced (R. 40a, 41a, 45a). It is clear and uncontradicted that the opening through which Petitioner fell had not existed when the

Luckenbach employees took over control of that portion of the vessel (R. 43-44a).

Although there were three compartments which were closed off by the Stevedores, the Luckenbach Foreman Claire obtained only two lights. Whether more were or were not available does not appear. One of these he put in the lower hold and connected to an electric plug at the forward end of the hatch of No. 3 hold. The other was connected by some unknown person at the after end of the hold and led into the shelter deck space. Petitioner was working in the lower hold and two other men in the shelter deck. No one was in the 'tween deck.

At about 6:30 P. M. the light in the lower hold went out (R. 100a). Petitioner called to the two men in the shelter deck, two levels above him (R. 101a). They shone their light down through the opening. The Petitioner came up from the lower deck to the 'tween deck, crossed the hatch boards covering the hatch opening at the 'tween deck level and climbed a ladder from the 'tween deck to the shelter deck (R. 26a). The opening in the floor of the shelter deck through which he came at that time was, of course, at the top of the ladder and it was this same opening through which he later fell (R. 40a). His foreman, Claire, ordered him to work in the shelter deck with the other two men and after he had been working there for a time, the light in the shelter deck also went out. It was pitch dark in the shelter deck space (R. 93a) and the Petitioner began to walk across the shelter deck hatch boards in order to reach a ladder which would lead him to the main deck so that he might relight the cluster light in the 'tween deck. He fell through the opening at the ladder and received the injuries for which he brought this suit.

There is abundant evidence in the Record as to the type of electric plug which was on the end of the extension cord *which led to the lower hold.* There is ample evidence in the Record that at the time of the accident the collar provided to hold *that* plug in the socket was screwed

tight. There is no evidence whatsoever in the Record to show that the plug at the end of the extension cord of the light in the shelter deck was properly plugged or that the collar provided was screwed tight prior to the time of the accident. The Record is silent on who inserted that particular plug in the socket although the inference is plain that it was placed there by some of the Luckenbach employees after Claire had procured the lights from the ship's locker.

The lights belonged to the vessel but the Petitioner's Foreman, Claire, had gone to the place on the ship where he knew they were stored, got two lights and placed them so that his men could use them in their work. There is no evidence whatsoever that there was any obligation on the part of the ship to furnish these men with lights. The ship's lights were available for use by the stevedores if they did not have enough of their own, but Claire did not request leave to take them nor tell any of the ship's officers that he had done so.

The Petitioner failed to introduce any evidence at all as to whether or not the ship's officers or crew had been told that in spite of the fact that the main hatch covers had been put in place by the Luckenbach stevedores, there were still other Luckenbach employees working in the closed space below. If, in fact any such notice had been given, it was clearly within the power of the Petitioner to have introduced evidence on the subject.

When the Petitioner started to walk across the hatch boards covering the opening at the shelter deck level of the ship, in complete darkness, he fell into the hole at the ladder which had been left open by the Luckenbach employees. This was the same opening through which the Petitioner himself had ascended into the shelter deck fifteen or twenty minutes before. He made no attempt before starting to walk in pitch dark to call for lights or light a match to show him his surroundings. However, before one of his fellow employees who heard him fall would attempt

to find out what had happened, the fellow employees lit a match (R. 73a).

At the close of the Plaintiff's case the Trial Judge granted (R. 134a) the Defendant's Motion to Dismiss (R. 130a). The grounds of dismissal were that the Plaintiff had not sustained his burden of proof on the question of negligence, that there was no evidence of unseaworthiness and that the Defendant American-Hawaiian Steamship Company, would not be responsible for any acts of negligence on the part of the officers or members of the crew of the vessel.

On appeal the Circuit Court (5 Judges) affirmed in an Opinion which, we submit, correctly decides all of the issues considered by that Court and presented by the Petition here.

## ARGUMENT.

The problem which the Petitioner in this case presents is whether this Court shall reverse itself and overrule its decision in *Caldarola v. Eckert*, 332 U. S. 155. The Petitioner will really not be affected in any event because he very probably has no cause of action on the merits, the District Judge having directed a verdict for Respondent on the ground that no negligence was shown as well as on the ground that this Court's decision in the *Caldarola* Case was controlling. Petitioner is assured of a determination of his case on the merits since he has instituted a separate action against the United States under the Suits in Admiralty Act.[2]

The only possible difference that a ruling on this case can make to Petitioner is that if this Court sets aside its prior decision in the *Caldarola* Case, he can have his case determined by a jury, assuming he can produce more evidence than he did at the first trial.

In our brief in the Court below we stated that the case was not in that Court "to overrule the Supreme Court nor to reargue the Caldarola Case". We cannot make that statement to this Court because the Petitioner very frankly is asking this Court to set aside its decision in *Caldarola*. Cf. Dissenting Opinion in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 at 113. Comparison of the brief in support of the Petition in the case at bar will show that it is practically the same as the Petition for Rehearing filed by the same counsel in the *Caldarola* Case. This Court denied rehearing there, *68 S. Ct. 30*. Attention is invited to the fact that the amicus brief in support of the present Petition is presented by the same counsel who represented the Petitioner in the *Caldarola* Case.

The contract in the case at bar was exactly the same contract which this Court interpreted in the *Caldarola* Case. Petitioner contends for a construction of that con-

[2] #121 of 1947 in Admiralty, District Court of the United States for the Eastern District of Pennsylvania.

tract which is contrary to the construction this Court has placed upon it. We submit that, aside from the considerations as to the national and international interests of the United States, a proper interpretation of the contract does not place the Respondent here in control of the vessel. Petitioner's reliance upon this Court's decision in *Brady v. Roosevelt Steamship Co., Inc.*, 317 U. S. 575, is misplaced. The Contract in the *Brady* Case was quite different. Among other things it required that Roosevelt man and operate the vessel whereas the contract here specifically provides that the master, officers and seamen are to be employees of the United States, and in practice the United States actually operated the vessel and performed the functions normally reserved to an owner. We think this contention is borne out by the operating regulations referred to in the brief for Petitioner. The Orders and Directives there quoted are clearly Orders from the one in control, not to the one in control.

In the *Brady* Case this Court said:

> "The sole question here is whether the Suits in Admiralty Act makes private operators such as Respondent non-suable for their torts."

Respondent here does not argue that question. It has insisted from the beginning that it should not be held vicariously liable for the acts of persons who were not its servants but those of the United States. Cf. *Restatement of Agency*, § 79, Comment (a).

The master and crew had actual possession and control of the Steamship "Niantic Victory."

> "The servant himself is, of course, liable for the consequences of his own carelessness but when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission." *Standard Oil Co. v. Anderson*, 212 U. S. 215, *Denton v. Yazoo & M. V. R. Co., et al.*, 284 U. S. 305.

Unless Article 3A (d) is completely deleted from the contract, the "Master" of the persons in control is the United States. Put differently, if *Caldarola* is to be reversed upon the basis of the interpretation of the entire contract, this Court must then rewrite in its entirety the law of vicarious liability. By analogy, the foreman in a factory or the store manager for a chain store would be responsible to third persons in tort actions where the negligence alleged was that of a subordinate. We are not unmindful that the foreman, manager or agent would be responsible for a negligent order or an act of negligence which was specifically directed. That, however, is not this case.

This Court's decision in *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, was an interpretation of statutes [3] applicable to members of the crew of a vessel, but neither the decision nor the statutes have any bearing on the present case. Petitioner here was not the employee of Respondent but of another Steamship Company engaged in stevedoring operations.

**Petitioner Intimates That the Caldarola Decision Applies Only to Actions Brought in the State Courts.**

Petitioner attempts to argue that, in any event, the rule of the *Caldarola* Case should not be applied to actions begun in the Federal Courts. The brief of amicus carries that thought along and argues that this Court refrained from passing upon the case which would have been presented if *Caldarola* had sued in the Federal rather than in the State Court.

There is no statute giving the District Court jurisdiction except the Judiciary Act provision of diversity of citizenship and jurisdictional amount. The case is not in admiralty where the District Court would have jurisdiction by reason of the fact that the actionable facts took place on

[3] War Shipping Administration Clarification Act, 50 U. S. C. A. Appendix 1291; Jones Act, 46 U. S. C. A. 688.

navigable waters. Therefore, Petitioner's argument boils down to this—that not the remedy but the right is different, depending upon the fortuitous circumstances of whether in a given case diversity exists. In other words, the argument leads to the conclusion that if Respondent had been a Pennsylvania rather than a New Jersey Corporation, not only the forum for enforcing the remedy would have been different, but Petitioner's fundamental rights would have been different.

> "It (Erie Railroad v. Tompkins) expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result." *Guaranty Trust Co. of New York v. York*, 326 U. S. 99 at 109.

The rule that liability in tort follows from control is the rule of the maritime law [4] and the law of Pennsylvania.[5]

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[4] *The Severance*, 152 F. (2d) 916; *Long v. Silver Line, Ltd.*, 48 F. (2d) 15; *The W. G. Mason*, 142 F. 913; *Byars v. Moore-McCormack Lines, Inc.*, 155 F. (2d) 587.

[5] *Zisman v. Duquesne City*, 143 Pa. Sup. 263. *See also Harris v. Lewistown Trust Company*, 326 Pa. Sup. 145; *Haydn v. Second National Bank of Allentown*, 331 Pa. 29 and *Buoy v. Fidelity-Philadelphia Trust Company*, 338 Pa. 5.

The rule of *Cullings v. Goetz,* 256 N. Y. 287, is the law of Pennsylvania. *Zisman v. Duquesne City,* 143 Pa. Sup. 263.

## CONCLUSION.

We respectfully point out to this Court that although Petitioner would proceed in *forma pauperis,* there is at least some question as to the propriety of his Petition. We are not unmindful of this Court's decision in *Adkins, Adm'x. v. E. I. duPont de Nemours & Company,* decided Nov. 22, 1948. The *forma pauperis* proceedings there were quite different.

In the case at bar, Petitioner was disabled for a little more than three months as the result of his injury. He was employed at the time of trial and has been earning in excess of $4,000.00 per year.

Vitally interested in his case because of its subrogation interest is Glens Falls Indemnity Company, compensation insurance carrier for Petitioner's employer, Luckenbach Steamship Company. There would seem to be no need of a *forma pauperis* proceeding except as a matter of strategy, which we strongly suspect is the case here.

The subrogation interest of compensation insurance carriers is one of the main reasons why these companies are so interested in obtaining a reversal of the *Caldarola* Decision. If these cases are tried in admiralty, the trial judge is aware of the compensation which the libellant has received and is not swayed by sympathy as is the case where a jury hears the evidence and is kept in the dark as to the fact that the injured has already received workmen's compensation.

The Petitioner suggests that the case at bar is on all fours with *Weade v. Dichmann, Wright & Pugh, Inc.,* No. 179, October Term, 1948. This Court granted certiorari in the *Weade* Case on October 18th, 1948. We can see no identity between that case involving a fare-paying pas-

senger and this, involving a longshoreman employed by a Company having no relationship, contractual or otherwise, with this Respondent. This Court has never considered the case of a passenger versus the general agent but it has already passed upon the case of the stevedore versus the general agent.

We urge that the Petitioner sets forth no reasons sufficient to justify reversal of this Court's decision in the *Caldarola* Case; that the case at bar is clearly governed by that decision and that the Petition should be denied.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
*Counsel for Respondent.*

JOHN A. FRIEDRICH,
KRUSEN, EVANS AND SHAW,
*Of Counsel.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 186. Misc.

ALBERT J. PALARDY,

*Petitioner,*

*v.*

AMERICAN-HAWAIIAN STEAMSHIP COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## PETITION FOR LEAVE TO SUBMIT BRIEF.

MAY IT PLEASE THE COURT:

The International Longshoremen's Association, affiliated with the American Federation of Labor, respectfully requests this Court to grant permission to file and receive the annexed brief in connection with the above entitled matter.

This Association represents approximately 80,000 longshoremen whose duties involve loading and discharging cargo, repairing, refitting and otherwise working on or about the vessels of the American Merchant Marine. The issue involved in this case will very materially affect the rights of all of the members of this Union and because of these considerations, special leave is respectfully sought to present the attached memorandum in support of the Petition for the Writ of Certiorari and the brief in support thereof.

In advance of this petition, Mr. Abraham E. Freedman, counsel for the petitioner, and Mr. Thomas E. Byrne, Jr., counsel for respondent, have expressed their consent to the filing of the brief as amicus curiae.

ABRAHAM M. FISCH,
*Attorney for Petitioner.*

## BRIEF OF AMICUS CURIAE.

The instant case was decided upon a grossly erroneous interpretation of the decision in *Caldarola v. Eckert,* 332 U. S. 155, which case was intended to be limited to the particular facts involved therein. To adopt the decision of the Court of Appeals in the instant case would, in effect, incorporate the common law of the State of New York into the Maritime Law in all actions, whether they be brought in the Federal or courts of any State. This Court in the *Caldarola* case specifically refrained from passing upon the liability of the General Agent under the Federal law and considered itself foreclosed upon that point by the decision of the New York Court of Appeals.

In the *Caldarola* case, this Court did not have the benefit of the delivery certificates and the Government there argued that there was never any delivery of the vessel, notwithstanding the actual facts as indicated by the certificates in possession of the Government at that time.

In the *Caldarola* case also the Government alleged a number of facts which are absolutely contradicted by competent evidence properly proven in other cases. The Government has never made any move to substantiate or prove any of those statements which are so palpably untrue. In addition to the delivery certificates which were suppressed by the Government and the respondents in the *Caldarola* case and other facts as are related in the Petition for the Writ of Certiorari and supporting brief, there is still further evidence of which the Government was aware but did not bring to the attention of the Court in the *Caldarola* case. It is contended by the Government that the authority of the General Agent stopped at the "water's edge". Not only is this statement refuted by an examination of the General Agency Agreement itself and the operations regu-

lations which were promulgated by the War Shipping Administration, but it is squarely contradicted also by the very statements which were made by the General Agent to the Insurance Companies in covering their liability against such risks as is involved in the case at bar. In the case of *Wright v. Eastern Steamship Company*, decided by the District Court for the Southern District of New York (Admiralty #152), the record shows the following:

"Eastern Steamship Lines, Inc.,
40 Central Street,
Boston, Mass.

Re: Primary Commercial Blanket Bond
No. S-50,223

Gentlemen:

This is to advise you as Insured under Primary Commercial Blanket Bond No. S-50,223, issued by this Company in your favor and dated the 31st day of December, 1945, that the words 'Employee' or 'Employees' as defined in the said bond shall be deemed to include the Captains and Crews of ships owned by the United States of America and operated by you under a Service Agreement with the War Shipping Administration.

Very truly yours,

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

By .....
Resident Vice President"

Here is concrete and specific evidence which not only disproves the Government's statement of facts, but which indicates a lack of candor and frankness on the part of the Government in its statements to this Court in the *Caldarola* case. Suffice it to say that both the United States and the

General Agents recognize that the personnel on the vessels would be considered, in point of fact, as the employees of the General Agent and that the latter would be responsible for all torts committed by any of the personnel of the vessels against longshoremen or other third persons. And it was against that very type of liability which the insurance policy was intended to protect the General Agent.

For these reasons and for the considerations which are set forth in the brief of the petitioner in the application for the Writ of Certiorari, all of which considerations this Association fully endorses, it is respectfully urged that your Honorable Court grant the Writ of Certiorari to the end that the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

ABRAHAM M. FISCH,
*Attorney for International Longshoremen's Association as Amicus Curiae.*